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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PETER C. LEE et al.,

Plaintiffs and Appellants,

v.

GREENRIDGE LCF ASSOCIATION,

Defendant and Respondent.

B211973

(Los Angeles County  
Super. Ct. No. BC374283)

APPEAL from an order of the Superior Court of Los Angeles County, Ralph W. Dau, Judge. Affirmed.

Lee Law Group, Robert Y. Lee and Kristian R. Meyer for Plaintiffs and Appellants.

Nelson Griffin and Edwin C. Mann for Defendant and Respondent.

## I. INTRODUCTION

Plaintiffs, Peter C. and Jane M. Lee, appeal from a September 17, 2008 order dismissing this action against their homeowners association, defendant, Greenridge LCF Association. Plaintiffs alleged a leak in defendant's irrigation line, which ran beneath their property, damaged their home. The trial court struck the testimony of Avram Ninyo, the sole witness plaintiffs relied on to establish causation. Because there was no evidence the leak caused plaintiffs' damage, the trial court subsequently granted defendant's nonsuit motion and entered the order of dismissal. We conclude plaintiffs have not established an abuse of discretion or reversible error. Accordingly, we affirm the dismissal order.

## II. BACKGROUND

In November 2005, plaintiffs noticed excessive water on their property. Upon investigation, it appeared neither their pool nor their irrigation system was the source of the problem. The water receded only when defendant's irrigation line, which ran beneath plaintiffs' property, was shut off and then capped. There was evidence of significant water damage to plaintiffs' residence, garage floor, and pool deck including: a warped hardwood floor in the family room; water damage to the family room carpet; mold in the garage, damaged drywall and base boards; and cracks in the brick and cement pool deck and patio.

Plaintiffs designated Avram Ninyo, a geotechnical engineer, as their sole witness on causation. Plaintiffs' counsel represented to the trial court that Mr. Ninyo would testify connecting alleged water damage to defendant's irrigation pipe. It was undisputed Mr. Ninyo had never visited plaintiffs' property. But his associates at Ninyo & Moore had conducted onsite testing and compiled data. The trial court ruled Mr. Ninyo could not testify concerning that data because he did not have personal knowledge and there

was no foundation for the report. The trial court stated, “You do not have a foundation for what was put in the ground, when, what data was taken[,] when recorded, by whom.”

Plaintiffs then called as a witness Michael Rogers, an engineering geologist with Ninyo & Moore. Mr. Rogers had performed the onsite testing at plaintiffs’ property. Mr. Rogers testified in some detail about those tests. Defense counsel objected to allowing Mr. Rogers to testify about the test *results* on grounds plaintiffs had not designated Mr. Rogers as an expert witness. After questioning Mr. Rogers outside the jury’s presence, the trial court agreed. The trial court concluded, consistent with Mr. Rogers’s testimony, that he had relied on his expertise as an engineering geologist in setting up the onsite tests and obtaining data.

Following further discussion about Mr. Ninyo’s proposed testimony, the trial court ordered an Evidence Code section 402 hearing. (All further statutory references are to the Evidence Code unless otherwise noted.) The trial court observed, “I want to know what [Mr. Ninyo’s] opinions [are] and the basis of the opinion, what it’s based on, what data, measurements, soil samples, et cetera [and, i]f it’s based on work provided by his staff, I want to know what that is.” Mr. Ninyo testified it was his opinion that a leak in defendant’s irrigation line running beneath plaintiffs’ property caused the damage to the residence. Mr. Ninyo further testified he based his opinion on the sequence of events Ms. Lee had related to him—particularly, that the water in her yard began to recede only when the water flow to defendant’s irrigation line was shut off. Mr. Ninyo did *not* testify he based his opinion on Mr. Rogers’s on-site testing and resulting report.

Mr. Ninyo subsequently testified to the same effect before the jury. Mr. Ninyo stated that in reaching his opinion he took into consideration: the facts made known to him by plaintiffs as to the history of their water leak problem; his own expertise and experience in geotechnology; his prior experience in dealing with situations where common association lines have failed and as a result have damaged property; deposition testimony to the effect that, “[defendant’s] irrigation line does go north-south and . . . was originally constructed to irrigate the slope which was to be a homeowner’s association

slope”; and “the ability that you develop as an engineer to do logical thinking, to connect the dots, to look at cause/effect relationships.”

On defendant’s motion, the trial court struck Mr. Ninyo’s testimony. The trial court ruled: “As a matter of law, there is no basis for the witness’[s] opinion. His entire testimony is stricken. [The] jury will be instructed to disregard it.” The trial court later granted defendant’s nonsuit motion, concluding: “The problem here is causation. It must be established by expert testimony. That has not been done.” The dismissal order was subsequently entered. This appeal followed.

### III. DISCUSSION

#### A. Standards of Review

The nonsuit motion resulting in the dismissal order followed the trial court’s ruling striking Mr. Ninyo’s testimony. A ruling excluding opinion testimony is reviewed for an abuse of discretion. (*People v. Curl* (2009) 46 Cal.4th 339, 359; *People v. Mickey* (1991) 54 Cal.3d 612, 688; *Dee v. PCS Property Management, Inc.* (2009) 174 Cal.App.4th 390, 403.) A trial court has broad discretion to exclude unreliable opinion testimony. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1061 [“[T]he trial court retains discretion to exclude expert testimony, including hearsay testimony, that is unreliable or irrelevant, or whose potential for prejudice outweighs its proper probative value”]; see *Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 704-705 [fire ranger who did not witness fire reported on cause of fire based on others’ statements]; *Ribble v. Cook* (1952) 111 Cal.App.2d 903, 906 [traffic officer’s opinion concerning collision based on witness statements].)

Our Supreme Court has explained a nonsuit order is reviewed as follows: “A motion for nonsuit allows a defendant to test the sufficiency of the plaintiff’s evidence before presenting his or her case. Because a successful nonsuit motion precludes submission of plaintiff’s case to the jury, courts grant motions for nonsuit only under

very limited circumstances. (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 117.) A trial court must not grant a motion for nonsuit if the evidence presented by the plaintiff would support a jury verdict in the plaintiff's favor. (*Id.* at pp. 117-118; *Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 395.) [¶] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff[s] evidence all the value to which it is legally entitled, . . . including every legitimate inference which may be drawn from the evidence in plaintiff[s] favor . . . ." (*Campbell v. General Motors Corp.*, *supra*, 32 Cal.3d at p. 118, quoting *Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 583; accord, *Ewing v. Cloverleaf Bowl*, *supra*, 20 Cal.3d at p. 395; *Estate of Lances* (1932) 216 Cal. 397, 400.) [¶] In an appeal from a judgment of nonsuit, the reviewing court is guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff. 'The judgment of the trial court cannot be sustained unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inference and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.' (*Mason v. Peaslee* (1959) 173 Cal.App.2d 587, 588; accord *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 699; *Hughes v. Oreb* (1951) 36 Cal.2d 854, 857.)" (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838-839; accord, *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

## B. Plaintiffs Have Not Demonstrated An Abuse Of Discretion

Plaintiffs contend the trial court abused its discretion when it excluded Mr. Ninyo's testimony. Plaintiffs assert that under section 801, subdivision (b), Mr. Ninyo properly relied on witness statements and data collected by members of his firm, Ninyo & Moore. Section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] . . . [¶] (b) Based on

matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.”

Plaintiffs argue: Mr. Ninyo’s opinion testimony was entirely proper because: although he did not personally conduct the onsite tests or collect the data from their real property, the matter was made known to him prior to trial; he analyzed the data and observations in the report prepared as a result of the onsite testing; and it was reasonable for Mr. Ninyo to rely on data obtained by other professionals.

We reject plaintiffs’ argument for three reasons. First, plaintiffs have failed to provide an adequate record on appeal. The only documents included in the clerk’s transcript are the dismissal order, the notice of appeal, and the record designation notice. We have no copy of the operative complaint or the answer thereto. We have no record of any pretrial proceedings. As the party challenging the dismissal order, it is plaintiffs’ burden to provide an adequate record to permit accurate appellate review. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448.) Appealed judgments and orders are presumed correct, and an appellant must affirmatively demonstrate error. (*Denham v. Superior Court* (1979) 2 Cal.3d 557, 564.) In the absence of a complete record, a reviewing court will not presume error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *In re Kathy P.* 1979) 25 Cal.3d 91, 102; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.)

Second, even based on the incomplete record, we conclude plaintiffs have forfeited their argument. Section 354 provides: “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of *the erroneous exclusion of evidence* unless the court which passes upon the effect of the error

or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) *The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means*; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination.” (Italics added.) The offer of proof or other means requirement allows the trial court to assess the proffered testimony and provides us with the means to assess prejudice. (*Gutierrez v. Cassiar Min. Corp.* (1998) 64 Cal.App.4th 148, 161; *People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) Absent some proof of the excluded evidence, an appellant cannot show a different result was probable if the evidence had been admitted. (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1223.) The failure to make the substance of the excluded opinion testimony known to the court bars consideration on appeal of plaintiffs’ claim it was an abuse of discretion to exclude that evidence. (§ 354; *People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6; *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 17-18; *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 886 [“The failure to make a specific offer of proof constitutes waiver of a contention that the court erroneously excluded evidence”]; *In re Mark C.* (1992) 7 Cal.App.4th 433, 444 [“Failure to make an adequate offer of proof (as to the testimony of an expert witness) precludes consideration of the alleged error on appeal”]; see *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1176-1177 [mitigating character evidence]; 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 401, p. 490.)

Here, plaintiffs were given the opportunity in a hearing outside the jurors’ presence to set forth Mr. Ninyo’s opinion and the matters he relied on in reaching his deductions. As noted above, at the outset of the hearing, the trial court specifically observed, “I want to know what [Mr. Ninyo’s] opinions [are] and the basis of the opinion, what it’s based on, what data, measurements, soil samples, et cetera” and, “If it’s based on work provided by his staff, I want to know what that is.” At the hearing, Mr. Ninyo testified he based his opinion the leak in defendant’s line caused plaintiffs’ damage on the

sequence of events Ms. Lee had related to him—particularly, that the water in her yard began to recede only when the water flow to defendant’s irrigation line was shut off. Mr. Ninyo *did not* testify that he relied on Mr. Rogers’s onsite testing and data collection. Mr. Ninyo *did not* testify as to what the onsite testing showed. Hence, plaintiffs failed to make known to the trial court the substance of Mr. Ninyo’s testimony predicated on the onsite testing and resulting report. The failure to do so bars consideration on appeal of plaintiffs’ claim it was an abuse of discretion to exclude that evidence. (*Karlsson v. Ford Motor Co.*, *supra*, 140 Cal.App.4th at p. 1223.)

Third, even if it was an abuse of discretion to exclude Mr. Ninyo’s testimony, the error would be harmless as a matter of law. (Cal. Const., art. VI, § 13; *Dee v. PCS Property Management, Inc.*, *supra*, 174 Cal.App.4th at p. 406; *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 739-740.) It was plaintiffs’ burden to prove by a preponderance of the evidence that a leak in defendant’s irrigation line caused the damage to their property. (See *Ullery v. County of Contra Costa* (1988) 202 Cal.App.3d 562, 572 [inverse condemnation]; *Souza v. Silver Development Co.* (1985) 164 Cal.App.3d 165, 171 [same].) Testimony is required to establish legal cause when, as here, causation is an issue beyond common experience. (*Campbell v. General Motors Corp.*, *supra*, 32 Cal.3d at p. 124; *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1373-1376; *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-403.) Moreover, an opinion amounting to nothing more than speculation does not constitute substantial evidence and is properly excluded. (*Stephen v. Ford Motor Co.*, *supra*, 134 Cal.App.4th at p. 1373; *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.) An opinion that something occurred must be accompanied by a reasoned explanation connecting the facts with the causation conclusion; otherwise the opinion is of no value. (*Dee v. PCS Property Management, Inc.*, *supra*, 174 Cal.App.4th at pp. 404-405; *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117; *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523-525.) The Court of Appeal has held, “[W]hen an expert’s opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that

opinion has no evidentiary value because ‘an expert opinion is worth no more than the reasons upon which it rests.’ (*Kelley v. Trunk*[, *supra*,] 66 Cal.App.4th [at pp.] 523-525.)” (*Jennings v. Palomar Pomerado Health Systems*, *supra*, 114 Cal.App.4th at p. 1117, accord, *Dee v. PCS Property Management, Inc.*, *supra*, 174 Cal.App.4th at pp. 404-405.) The Court of Appeal has explained: “[A]n expert’s conclusory opinion that something did occur, when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion, does not assist the jury. In this latter circumstance, the jury remains unenlightened in how or why the facts *could* support the conclusion urged by the expert, and therefore the jury remains unequipped with the tools to decide whether it is more probable than not that the facts *do* support the conclusion urged by the expert. An expert who gives only a conclusory opinion does not *assist* the jury to determine what occurred, but instead supplants the jury by *declaring* what occurred.” (*Jennings v. Palomar Pomerado Health Systems*, *supra*, 114 Cal.App.4th at pp. 1117-1118.)

Here, nothing in the record supported a causal connection between the leak and plaintiffs’ damages. In his testimony at the section 402 hearing and again before the jury, Mr. Ninyo failed to explain how the predicate facts—including that the water in plaintiffs’ yard receded after defendant’s irrigation line was shut off—led to the conclusion a leak in defendant’s irrigation pipe (if any) resulted in the damage to plaintiffs’ residence. Mr. Ninyo did not explain how he employed his expertise to connect the leak with the damage and to conclude there was causation. He said nothing about what the subsurface conditions were, how water affects soil and structures, how long the leak would have had to exist, how an irrigation pipe leak could lead to the type of damage observed at plaintiffs’ home, or anything of that nature. That the water on plaintiffs’ property began to recede only when the water flow to defendant’s irrigation line was shut off was insufficient to support Mr. Ninyo’s opinion the leak caused significant damage to plaintiff’s home. The order excluding Mr. Ninyo’s testimony is not a ground for reversal of the nonsuit order.

### C. The Dismissal Order Must Be Affirmed

With respect to the nonsuit and subsequent dismissal orders, plaintiffs argue, “[T]he trial court’s judgment of nonsuit and dismissal of the Lees’ complaint was also erroneous since it was based entirely on the court’s exclusion of [Mr.] Ninyo’s expert opinion.” We have found no abuse of discretion in connection with excluding Mr. Ninyo’s testimony. And, as plaintiffs concede, there was as a result no evidence of causation. As noted above, properly qualified opinion testimony is required to establish causation when, as here, it is an issue beyond common experience. (*Stephen v. Ford Motor Co.*, *supra*, 134 Cal.App.4th at pp. 1373-1376; *Jones v. Ortho Pharmaceutical Corp.*, *supra*, 163 Cal.App.3d at p. 403.) Further, it is well settled that when a plaintiff fails to produce substantial evidence of causation, the granting of a nonsuit is proper. (E.g., *Markowitz v. Fidelity Nat. Title Co.* (2006) 142 Cal.App.4th 508, 520; *Stephen v. Ford Motor Co.*, *supra*, 134 Cal.App.4th at pp. 1373-1374; *Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1209; *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 531; *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580; *Jones v. Ortho Pharmaceutical Corp.*, *supra*, 163 Cal.App.3d at p. 402; *Rufo v. N.B.C. Broadcasting Co.* (1959) 166 Cal.App.2d 714, 720.) Because there was no evidence of causation, we must also affirm the nonsuit and dismissal orders.

#### IV. DISPOSITION

The September 17, 2008 dismissal order is affirmed. Defendant, Greenridge LCF Association, is to recover its costs on appeal, jointly and severally, from plaintiffs, Peter C. and Jane M. Lee.

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TURNER, P. J.

I concur:

KRIEGLER, J.

MOSK, J., Concurring

I concur.

I would not conclude the record is inadequate for purposes of this appeal. There is nothing in the clerk's transcript that would appear to bear on the evidentiary and nonsuit issues. The appellant has to provide an adequate record "demonstrating the alleged error" and "on the issue." (1 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 8:17, p. 8-5.) Moreover, defendant never raised the inadequacy of a record on issue, and plaintiffs never had a chance to address that issue. I do not believe there was any forfeiture of an issue. Plaintiffs' expert testified as to the substance of his expert opinion. Defendant did not raise forfeiture as an issue, and plaintiffs did not have the opportunity to deal with that issue.

I concur because it appears that plaintiffs relinquished at trial the principal point they raise on appeal—the expert should have been able to rely upon the reports of his associates in forming his opinion. At the Evidence Code section 402 hearing, the expert, when asked upon what he was relying, did not specify the reports by his associates. And plaintiffs' counsel represented to the court that the expert's opinion is not based on any data taken by members of his staff. Plaintiff does not specifically contend on appeal that nonsuit should not have been granted because, even without expert testimony, a jury might infer from the evidence the leak caused damage to the house.

Whether or not there was a proper foundation for the data the expert's associates created, it appears that plaintiffs ultimately determined that the expert was to forego using that material. And plaintiffs do not argue on appeal that the expert could have relied solely on statements of other witnesses. Moreover, plaintiffs do not, on appeal, rely upon the following statement of the trial court. "This witness [the expert] testified at the outset

of his examination that there were site visits and test pits, piezometers placed in borings, and that there was a cause and effect relationship that the leak before November of '05 had an effect on the residence. That testimony was given without objection.”

I have some hesitancy because a disjointed trial proceeding may have led to confusion in the past of plaintiffs’ counsel. Initially, there were suggestions that there was a lack of foundation for the expert’s reliance on the staff work. Thereafter, counsel could have assumed that the expert would not be permitted to rely on that work. At one point the court said, “So you’re representing to the court that Mr. Ninyo’s opinion is not based on any data taken by members of his staff; is that where we are?” Counsel responded, “I think I can modify it to that effect, yes. If that’s the court’s desire, I will comply with it.” Thereafter, a confusing colloquy ensued. Nevertheless, it was plaintiff’s obligation to make certain that it offered the evidence and obtained a ruling in order to preserve the issue for appeal. The trial was plagued by questions to which objections were properly sustained, stricken testimony, the Evidence Code section 402 hearing, and some confusion as to what evidence was excluded or would be excluded.

“The most fundamental rule of appellate review is that an appealed judgment or order is *presumed to be correct*. ‘All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.’ [Citations.] [¶] Appellate courts *never speculate* that trial error occurred. Any ambiguity in the record is resolved *in favor* of the appealed judgment or order.” (1 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶¶ 8:15-8:16, p. 8-5.)

Because of the state of the record and the issue raised on appeal, I reluctantly concur in the judgment.

MOSK, J.